IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SONYA HOFFMANN, Plaintiff, v. WELLS FARGO BANK, N.A., d/b/a Wells Fargo Home Mortgage, and PHELAN HALLINAN DIAMOND & JONES, LLP, f/k/a Phelan Hallinan & Schmieg, LLP, and FLASTER/GREENBERG, PC, and KENNETH S. GOODKIND, ESQUIRE, Defendants.	Civil Action No.: 16-4230

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO FLASTER/GREENBERG, PC, AND KENNETH S. GOODKIND, ESQUIRE'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by and through undersigned counsel, submits this memorandum of law in opposition to the motion for summary judgment filed by Defendants Flaster/Greenberg, PC, and Kenneth S. Goodkind, Esquire ("Goodkind") (Doc. 52).

I. PRELIMINARY STATEMENT

As shown below, Flaster/Greenberg and Goodkind are not entitled to judgment as a matter of law, because, at minimum, there is a genuine dispute as to material fact, pursuant to Rule 56(a), as to their violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g(a) (FDCPA).

II. STATEMENT OF FACTS

Flaster/Greenberg and Goodkind's "Undisputed Material Facts" (Mem. Supp. Mot. Summ. J. at 3-5) are not undisputed. During the relevant time, at least, Flaster/Greenberg and Goodkind did represent creditors (see Creditor Representation, at http://www.flastergreenberg.com/practices-Creditor_Representation.html (last visited Feb. 11, 2016) (print attached)) and practiced mortgage foreclosure (see Pennsylvania Foreclosures and Repossessions, at http://www.flastergreenberg.com/newsroom-articles-Pennsylvania_Foreclosures_and_Repossessions_Article.html (last visited June 21, 2017) (print attached); Flaster Greenberg Attorney Kenneth S. Goodkind Elected to Executive Committee, at http://www.flastergreenberg.com/newsroom-news-Flaster_Greenberg_Attorney_Kenneth_S_Goodkind_Elected_to_Executive_Committee.html (Jan. 19, 2015) ("Goodkind is a member of the firm's Litigation Department, handling . . . mortgages and foreclosures . . . .") (print attached)) and, thus, held themselves out as such. (Cf. Mem. Supp. Mot. Summ. J. at 3-4 (¶¶ 10, 13) (citing Goodkind Decl. ¶¶ 3, 10) (omitting, from list, mortgages, foreclosures, and repossessions)). Goodkind, for his part, counsels clients in complex commercial disputes and all facets of debtor-creditor relationships as well as in trust and estates matters. (Kenneth S. Goodkind 1, at http://www.flastergreenberg.com/people-Kenneth_Goodkind.html (last visited Feb. 11, 2016) (print attached); cf. Mem. Supp. Mot. Summ. J. at 3 (¶ 11) (citing Goodkind Decl. ¶¶ 5, 10) (omitting, from list, "all facets of debtor-creditor relationships").) And, in at least two recent New Jersey mortgage foreclosure cases, Flaster/Greenberg and Goodkind have, at least, attempted debt collection. (See, e.g., Deutsch Aff. & Ex. 1 (attached hereto); Kelly Aff. & Ex. 1 (attached hereto).) That "Goodkind and Flaster have never regularly engaged in consumer-debt collection activity covered by the FDCPA" (Mem. Supp. Mot. Summ. J. at 4 (¶ 12) (citing Goodkind Decl. ¶¶ 6-7)) is, at best, their legal conclusion, not an "undisputed material fact[]" (see id. at 3; see also id. 8 (citing Goodkind Decl. ¶¶ 6-11) ("[T]he undisputed fact is that none of the attorneys at Flaster, including Goodkind, regularly engage in consumer-debt collection.")).

III. ARGUMENT

Flaster/Greenberg and Goodkind's motion rests entirely on Goodkind's declaration (see id. at 8), which is without any supporting evidence (see id. & Goodkind Decl. passim) and is even contradicted by the available evidence. Flaster/Greenberg and Goodkind insist, here, on relitigating whether they attempted to collect a debt from Plaintiff. (See Mem. Supp. Mot. Summ. J. at 1 ("Importantly, it is undisputed that the Flaster Defendants were not engaged by Phelan to collect any debt. . . . ") & n.1 ("The Flaster Defendants vigorously dispute that the alleged conduct—which consisted of asking routine deposition questions—constituted collection activity."), 5 (¶ 15) (citing Goodkind Decl. ¶ 13) ("The questions were not an effort to collect a debt . . . .") & n.2 ("The purpose of Goodkind's email was not to 'collect a debt' but, rather, was to explore settlement . . . ."), 7-8.) But this Court has already rejected their argument. (See Goodkind Decl. Ex. 1 at 8-9 ("I reject Goodkind's argument and find that Plaintiff has established the required element of debt collection activity."), 11 ("The problem with this argument is Goodkind's deposition questioning and follow-up e-mails indisputably shaded into debt-collection activity."); see id. at 9 n.7 ("Based on my own review of the case law, I am satisfied that these factors do not transform Goodkind's conduct into something other than debt collection activity.").)

The available evidence shows that, during the relevant time, Flaster/Greenberg and Goodkind held themselves out as representing creditors (see Creditor Representation, at http://www.flastergreenberg.com/practices-Creditor_Representation.html) and practicing mortgage foreclosure (see Pennsylvania Foreclosures and Repossessions, at http://www.flastergreenberg.com/newsroom-articles-Pennsylvania_Foreclosures_and_

Repossessions_Article.html; Flaster Greenberg Attorney Kenneth S. Goodkind Elected to Executive Committee, at http://www.flastergreenberg.com/newsroom-news-Flaster_Greenberg_Attorney_Kenneth_S_Goodkind_Elected_to_Executive_Committee.html ("Goodkind is a member of the firm's Litigation Department, handling . . . mortgages and foreclosures . . . ."). Goodkind, specifically, counsels clients in complex commercial disputes and all facets of debtor-creditor relationships as well as in trust and estates matters. (Kenneth S. Goodkind 1, at http://www.flastergreenberg.com/people-Kenneth_Goodkind.html.) "All facets" of the debtor-creditor relationship would, naturally, include debt collection. So, now, Goodkind wants to have it both ways: marketing himself, to creditors, as handling mortgages and foreclosures and all facets of the debtor-creditor relationship, while avoiding the legal responsibility that comes along with it.

And, in at least two recent mortgage foreclosure cases, Flaster/Greenberg and Goodkind have, at least, attempted debt collection. (See, e.g., Deutsch Aff. & Ex. 1; Kelly Aff. & Ex. 1.) An action in mortgage foreclosure is, of course, an attempt to collect a debt under FDCPA, and a false representation therein may constitute a "false representation . . . to collect or attempt to collect any debt" under § 1692e. E.g., Kaymark v. Bank of Am., N.A., 783 F.3d 168, 174-79 (3rd Cir. 2015).

Flaster/Greenberg and Goodkind cite, in support, Adams v. Tillery, Civ. A. No. 16-5896, 2017 WL 1477140, at *3 (E.D. Pa. Apr. 24, 2017) (DuBois, J.). (See Mem. Supp. Mot. Summ. J. at 9.) In Adams, defendant Tillery, a partner at co-defendant Pepper Hamilton, LLP, sent letters demanding payment of hold-over rent and cleaning costs from his former tenants, on Pepper Hamilton letterhead. Adams, 2017 WL 1477140, at *1. The Court found the plaintiffs' argument that Tillery's use of Pepper Hamilton letterhead made him or Pepper Hamilton a debt collector unpersuasive. Id. at **2-3 (dismissing claim with prejudice). This, of course, has no relevance where, like here, the attorneys were allegedly acting as debt collectors for their clients. Id. at *3 (citing Jerman v. Carlisle, McNellie, Rini, Kramer, 559 U.S. 573 (2010); Heintz v. Jenkins, 514 U.S. 291 (1995)). Flaster/Greenberg and Goodkind also cited James v. Wadas, 724 F.3d 1312, 1317-18 (10th Cir. 2013) (citing Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 62-63 (2d Cir. 2004)) ("[T]he following factors and considerations a[re] relevant to a regularity inquiry: (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernible, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having debt collection expertise may also be an indicator of the regularity of collection as a part of the practice."), but failed to apply those factors to the facts of this case. (See Mem. Supp. Mot. Summ. J. at 9.)

Flaster/Greenberg and Goodkind have, thus, failed to show that there is no genuine dispute as to any material fact; accordingly, their motion for summary judgment should be denied. See Fed. R. Civ. P. 56(a) (2017). Alternatively, to the extent that Plaintiff cannot, at this point, present facts that may be essential to justify her opposition (see Pearson Decl.), the Court should defer considering the motion or deny it, or allow time to take discovery. See id. R. 56(d).

IV. CONCLUSION

For the above stated reasons, Flaster/Greenberg and Goodkind's motion for summary judgment should be denied.

Respectfully submitted,

s/ David E. Pearson

David E. Pearson, Esquire
6983 Weatham Street
Philadelphia, PA 19119
E-mail: DavidEP137@aol.com
Telephone: (215) 849-1750
Facsimile: (215) 849-1830
Attorney for Plaintiff

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